No. 14463

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY, *Respondents.*

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF OF SCHERRER AND DAVISSON, Respondents

PATTERSON, MAXWELL & JONES
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INDEX

AUTHORITIES CITED

Cases

Statutes

Legislative Record

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JURISDICTION

Respondents adopt petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

The respondents, Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, co-partners d/b/a Scherrer and Davisson, are engaged in the business of logging. Their principal office is at Granite Falls, Washington. In 1953 the company's logging operations were being conducted in the vicinity of Sultan, Washington, a distance of over fifty miles from Granite Falls.

William Davisson, Oscar Scherrer and Phillip Davisson were formerly members of the I.W.A. affiliated with the C.I.O. prior to the formation of their

partnership in 1948 (R. 14 and 85). Respondents' employees have been represented by the I.W.A. and have been practically 100% unionized since the formation of the partnership (R. 82, 83).

Although respondents had entered into a working agreement with the I.W.A. local union 23-93 affiliated with the C.I.O. the failure or refusal of respondents to hire Mr. Cook was never taken up by the local union under grievance procedure provisions of the agreement (R. 66, 83, 84).

The working agreement between respondents and I.W.A. local union 23-93 contained a provision controlling the recall of employees after a layoff or shutdown (R. 86).

After ceasing operations late in 1952 because of weather conditions, the company resumed work on April 22, 1953, and pursuant to the terms of its union agreement called employees who had been in the employ of the company when it shut down in 1952 back to work (R. 86). Since there was no down timber at that time, the rigging crew was first employed to fall timber. This was the usual practice when operations were resumed. After sufficient timber was down the riggers were assigned to their regular work of yarding and loading and the cutting crew was then put to work (R. 95, 96).

In March, 1953, approximately two months before the Company commenced operations, Alex Cook, who lives near Granite Falls, called at the home of William Davisson, also near Granite Falls, and inquired as to whether or not the Company would be hiring any power

saw operators (R. 33). Mr. Davisson stated that he did not know how many of the Company's regular crew would report back for work when called, but assumed that they would need some men (R. 40, 41). He also told Cook that the Company was going to operate only one "crummy" (truck used for transportation of employees to and from work) to carry employees from Granite Falls to the logging area near Sultan (R. 41), and that they wanted to eliminate the transportation problem (R. 42, 87). Mr. Davisson further testified that he told Cook that the Company intended to hire only men living near Sultan or in the vicinity of the Company's operations (R. 87, 89). Although Mr. Cook denies this (R. 41), his denial is refuted by his later testimony that he (Cook) "could drive to Sultan" (R. 42). Both Mr. and Mrs. Davisson disagree with Mr. Cook's version of this offer (R. 87).

This evidence is further substantiated by Mr. Castle, Secretary-Treasurer and Business Agent of I.W.A., Local 23-93, who was contacted by Mr. W. Davisson in May regarding available power saw operators and advised Mr. Davisson that there were power saw operators available in the Sultan area (R. 69, 70). Later on in June, Mr. Castle said he asked Mr. Davisson why he had not hired Cook. Mr. Castle quoted Mr. Davisson as stating that Cook was a good man, that he would like to hire him, but there was no room for him on the crummy and that he did not want more men from Granite Falls because of the transportation problem (R. 71).

Testimony concerning Mr. Cook revealed that he is

and has been a power saw operator for eight years (R. 32), had been an employee of the W.R.W. Logging Company and still was in the employ of Wilmac Logging Company (R. 32), had seniority at Wilmac (R. 53), and had never worked for Scherrer and Davisson (R. 32). He, along with other members of the Wilmac crew, was in a lay-off status due to the fact that the Wilmac operation was closed in late fall of 1952 and had not resumed operations (R. 53). He was still constructively in the employ of Wilmac subject to call-back (R. 53).

Concerning Mr. Cook's employment, Mr. W. Davisson testified that in hiring new men, he did not wish to hire persons who were in the employ of other operators and who held seniority rights in other firms because such workers would when recalled to work by their employer, leave his Company, leaving him shorthanded, to return to their regular employment where they had seniority (R. 90). Mr. Davisson also mentioned that there was a general understanding or agreement among the operators in the area that they would not "steal each other's men" (R. 97).

The testimony also shows that Mr. Rawlins, who was employed at W.R.W., served on the union committee and was also then on picket duty (R. 63). Testimony further shows that Mr. Rawlins had worked for Scherrer and Davisson before and that during the second strike he was given temporary employment with Scherrer and Davisson (R. 63). Mr. Davisson offered Mr. Rawlins employment in 1953 (R. 63). Mr. Rawlins testified that it was in April, but he was uncertain as

to date (R. 63). Mr. Davisson testified that the offer was made about the 10th of May (R. 91), at which time Mr. Rawlins refused the employment stating that he could not leave Alex Cook (R. 91).

Mr. Rawlins and Mr. Cook in April made application to the State of Washington for a permit to log lands belonging to Mr. Cook and on May 5, after they had spent considerable time examining and testing the donkey to use in their logging operation, they purchased it from Mr. Huswick. Although Mr. Rawlins attempted to explain away their planned business venture by saying they intended logging for themselves only when they were not otherwise gainfully employed (R. 66), he nevertheless rejected employment offered to him by respondent on May 10, 1953, saying:

> "at that time I refused the job. I told him why. That I couldn't leave Alex alone." (R. 66)

With reference thereto, Mr. Davisson testified as follows:

> "I went to get him to come to work and Mr. Rawlins told me that he and Mr. Cook were working for themselves, taking out pulp wood, and until Mr. Cook found employment some place else he couldn't leave him." (R. 91)

Mr. Cook denied that he and Rawlins were going to gypo (R. 44), but when faced with State Permits (R. 44, 45, 46, 47, 48, 49), had to admit the facts.

Mr. Davisson testified that rigging men were hard to find at any time and they usually hired good rigging men wherever they could find them, but that a cutting crew was easier to pick up (R. 92).

Mr. Castle, witness for general counsel, testified that after Mr. Cook applied for work the company hired the following individuals: Tom Stalnaker (R. 72), Frank Brush (R. 72, 73, 74), Ralph Dexter (R. 73, 74), Devon Russell (R. 73, 74, 75) and Leonard Treen (R. 73, 74, 75). His testimony was hearsay, but Mr. Davisson who testified from the time books of the Company, testified that Mr. Stalnaker was hired on May 8, 1953, and picked up in Sultan (R. 93). Earl Enderson lived in the Sultan area and was picked up in Sultan (R. 93). Mr. Russell was likewise picked up in Sultan, as was Mr. Treen. Ralph Dexter was a former employee on leave because of his military duty and taken back upon being discharged from the Army (R. 92). Frank Brush, who lived in Granite Falls, was on the rigging crew and was hired in May (R. 92). To summarize, four of the six employees lived or were picked up in the Sultan area and of the two who resided in the Granite Falls area, one was a rigger, which is a job classification difficult to fill at any time, and the other was a former employee with seniority rights who had been rehired by the Company upon his discharge from the Army (R. 91, 92, 93).

Testimony shows that in the spring of 1952 beginning in April, there was an industry-wide strike which extended until the end of June. The testimony also shows that after the end of this strike, the union called a strike at Wilmac Logging Company and W.R.W. over some local issues (R. 36, 37).

The only testimony as to union activity, if any, on the part of Mr. Cook is that in 1952 he served as Vice-

President of the Local Union, was a shop steward at Wilmac, and that he was on the union safety committee (R. 36, 37).

Roberts, a brother-in-law of Alex Cook, testified to an alleged conversation with Oscar Scherrer. According to Mr. Roberts, he and Mr. Scherrer were eating lunch at the logging operation at which time no other person or persons were present within hearing distance (R. 77, 78, 79). He stated that Mr. Scherrer voluntarily and without provocation (R. 79) said that he would not hire Alex Cook because:

> "He was too active in the union and he was afraid if he hired Cook that Alex would cause his men to go on strike. And he had heard around the country that Alex Cook was the cause of all the strikes and that it happened before." (R. 77)

Roberts further testified that one afternoon while Mr. Scherrer was working helping him, Roberts, chase on the cold deck, Mr. Scherrer voluntarily stated that he would not hire Alex Cook because Alex Cook was "too active in the union" (R. 78).

Oscar Scherrer denied both of these alleged conversations (R. 13, 14, 109). Mr. Scherrer specifically stated that he never engaged in conversations with Mr. Roberts about employing anyone or that he ever said he would not allow his Company to hire Alex Cook; that he never referred to union activities on the part of Alex Cook and that his Company had never refused employment to anyone because of union activities (R. 13, 14, 109).

Roberts testified to an alleged conversation with

William (Red) Davisson about a week before the Company hired Roberts. This conversation is alleged to have taken place one evening at the home of Mr. Davisson, and according to Roberts, Mr. Davisson stated:

> "He would like to hire Alex Cook, but he could not because his partner would not let him." (R. 81)

Mr. William (Red) Davisson denied that he had ever had a conversation with Mr. Roberts regarding Mr. Cook (R. 111, 112).

Mr. Cook testified to a second conversation with Mr. William Davisson some time late in April or early in May. His testimony with regard to the date was very indefinite and uncertain. He stated that he and Mr. Rawlins had been looking at a donkey; that they were returning to their homes, each in his own car. When he arrived in front of Mr. Davidson's house he saw Mr. Rawlins' car parked in the driveway and that he, Cook, stopped his car on the roadway, got out and got into Mr. Rawlins' car. Mr. Cook testified that Mr. William Davisson and Mr. Rawlins were talking when he got there. Cook stated that he, at that time, asked Mr. Davisson if he was going to have a job for him, and said Mr. Davisson

> "started to make excuses that the rigging was still on, and that he didn't have any need, he said the snow was pretty deep yet up on the hill."

Cook then said that he asked Davisson if it was not because of the "trial at Wilmac," to which he alleged Davisson replied:

> "That is the whole damn thing." (R. 36, 37)

Mr. Rawlins' testimony on this point and this conver-

sation was substantially the same, except that he quoted Mr. Cook as saying:

> "I think it looks to me that Mackie has got something to do with it, and as near as I remember the words, Mr. Davisson said 'I know damn well he has'." (R. 59, 60)

The time of this alleged meeting or conversation with Mr. Davisson is pretty well fixed by Mr. Rawlins' testimony that it took place the day they purchased the donkey (R. 69), which, according to Mr. Huswick, the individual from whom the donkey was purchased, was May 5, 1953 (R. 116, 117). Mr. Rawlins testified further that Mr. Davisson never said that he would not hire Cook because of Cook's union activities (R. 66). Both Mr. and Mrs. Davisson denied that Mr. Cook ever got out of his car and into Mr. Rawlins' car (R. 88, 89). Mr. Davisson denied that he ever had a conversation with Cook on this occasion and specifically denied having ever made the above statement (R. 88, 89, 90).

The trial examiner further found that Davisson came to Rawlins' home in early April and said that Rawlins could not be hired "because of the union activity, because of that strike." Mr. Davisson denied this statement charged to him (R. 91). Mr. Rawlins testified:

> "A. I asked him (Davisson) if he could give me a job this year. And he said, I don't see why not." (R. 55)

Rawlins, who had worked for respondent in 1950 and 1952 (R. 54), also testified that Davisson told him if he would sever his employment with W.R.W. respondents would hire him (R. 58), and that he subsequently refused employment offered by respondent because he

and Mr. Cook were logging on their own and he *"wouldn't be able to work for him (respondent) until such time as Mr. Cook got a job because I couldn't leave him (Cook) alone"* (R. 60) (Emphasis supplied.)

SUMMARY OF ARGUMENT

No order of enforcement should be issued where the findings of the Board are not supported by a preponderance of substantial evidence. The test of substantiality requires that the Board and the Court consider the record as a whole. It is not enough that there is some testimony in the record which supports the findings made by the Board. The court must weigh against such testimony and evidence other testimony and evidence which detracts therefrom.

In the instant case the Board relied solely upon disputed testimony and evidence to support its findings. The Board did not weigh against this disputed testimony and evidence undisputed testimony and evidence. The Board's conclusions are predicated upon "suspicion, surmise, implications or plainly incredible evidence."

ARGUMENT

A. Preponderance of Substantial Evidence Required.

Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Section 151 *et seq.*) insofar as relevant provides:

> "* * * If upon a preponderance of the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in * * * an unfair labor practice, then the Board shall state its findings of fact and shall issue * * * its order."

Section 10(e) specifically states:

> "The findings of the Board with respect to questions of fact *if supported by substantial evidence on the record considered as a whole,* shall be conclusive." (Emphasis supplied.)

These sections are explained in the Joint Conference Report as follows:

> "In Section 10(c) the House Bill provided that the Board should base its decision upon the weight of the evidence. The Senate amendments retain the present language of the Act, permitting the Board to rest its orders upon all the testimony taken. The conference agreement provides that the Board shall act only on the 'preponderance' of the testimony—that is to say, *on the weight of the credible evidence.* Making the preponderance test a statutory requirement will, it is believed, have important effect. For example, the evidence could not be considered as meeting, the 'preponderance' test merely by the drawing of 'expert' inferences therefrom, where it would not meet the test otherwise. Again the Board's decisions *should show on their face* that the statutory requirement has been met —*they should indicate an actual weighing of the*

> *evidence setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, or drawing this inference rather than that.* Immeasurably increased respect for decisions of the Board should result from this provision." (Conference Report, House Report 510 80th Congress, Page 53, 54) (Emphasis supplied).

Conversely, decreased respect will result when the above provision is not followed.

The question as to what constitutes substantial evidence has been before the Supreme Court of the United States on various occasions and the rule is very well established. In *Washington V. & M. Coach Co. v. Labor Board,* 301 U.S. 142, the court said:

> "Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

See also *Consolidated Edison Co. v. Labor Board,* 305 U.S. 197, 229.

In *Labor Board v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300, the Supreme Court said substantial evidence is evidence which

> "must do more than create a suspicion of the existence of the fact to be established * * *. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

In *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 478, it was held that the test of substantial evidence is not met

> "when the reviewing court could find in the record

evidence which, when viewed in isolation, substantiated the Board's findings."

And again in referring to the legislative history of the Administrative Procedures Act and the National Labor Relations Act and stating that the legislature, while reaffirming the "substantial evidence" test, made it unequivocally clear that they disapproved

> "of the manner in which the courts were applying their own standard. The committee reports of both houses refer to the practice of agencies to rely upon 'suspicion, surmise, implications or plainly incredible evidence' and indicated that the courts are to exact higher standards 'in the exercise of their independent judgment' and on consideration of 'the whole record'." *Universal Camera Corp. v. NLRB,* 340 U.S. 474-483, 484.

And further the court said:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488.

and further:

> "We conclude, therefore, the Administrative Procedures Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of the Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed upon them a responsibility for assuring that the Board keeps with reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appears substantial when viewed, on the record as a whole,

by courts invested with the authority and enjoying the prestige of the courts of appeal. *The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before the court of appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." Universal Camera Corp. v. NLRB,* 340 U.S. 474, 490. (Emphasis supplied.)

As will be shown, the above principles, rules and tests were not applied by the Trial Examiner or the Board in this case.

B. Trial Examiner's and Board's Findings Not Based on Preponderance of Substantial Evidence.

The Trial Examiner stated:

> "I find the testimony of general counsel's witnesses to be convincing." (R. 14).

By this statement it can only be assumed that he relied upon the testimony of all such witnesses. Such is not the case.

Vern Castle, the Union Business Agent, testified, regarding the company's failure to hire Cook, that Mr. William Davisson of the company said:

> "Cook was a good man, that he would like to hire him, but there was no room for him on the crummy and that he did not want more men from Granite Falls because of the transportation problem." (R. 71).

This testimony of the Union Business Agent is almost word for word identical to the testimony of the witnesses called by the Company. It bears directly on the

fundamental issue in this case. Neither the Trial Examiner nor the Board gave any weight or consideration to this testimony which conformed to respondent's testimony. This testimony is entitled to greater weight than the self-serving testimony of Mr. Cook, an interested party and his friend, Mr. Rawlins. The Trial Examiner gave no weight to the testimony of Vern Castle that the Company had inquired of him as to available power saw operators and that he, Vern Castle, had told the Company there should be some in the Sultan area. The admission of the Union Business Agent on direct examination that he had referred Mr. William Davisson to available men in the Sultan area is subject to but one inference, that is, that the Company had inquired regarding the available men in that area.

Again in the intermediate report, the Trial Examiner said:

> "I am persuaded that Cook's strike activity did engender resentment and a disposition to retaliate in some quarter and that influence was brought to bear upon respondent to refuse him employment." (R. 14).

What strike activity? The record is silent on any strike activity on the part of Cook. The only testimony is that Cook was Vice-President of Local 23-93 in 1952, served on the union safety committee and was Union Shop Steward (R. 36, 37). There is no testimony of anything done or said by Cook to show, or attempt to show, that Cook engaged in any particular strike activity. The only testimony with reference to a strike was that in 1952 starting in April there was an industry-wide strike participated in by all the logging employees in

the Northwest. The only other testimony with reference to a strike is that two of the logging operators in the Granite Falls area were on strike in the fall of 1952 over some local issues. There is no showing as to who called the strike; there is no showing that Cook took part in any unusual union activity. There is no showing that respondents were informed of or had reason to know anything concerning Mr. Cook's alleged union activities. Cook had no dealings with Scherrer and Davisson of or concerning the industry-wide strike (R. 5). The undisputed testimony is that

> "Mr. Mackie did not prevail upon Mr. Scherrer not to hire Mr. Cook (R. 97).

Thus when the Trial Examiner said that Cook engaged in strike activity which "engendered resentment" against him, the Trial Examiner is not relying upon the record but the figment of his imagination, surmise and conjecture.

Cook returned to his regular employment after the strike and worked until the winter shutdown (R. 53). He was still employed by Wilmac and subject to call back to work when he allegedly applied for work with the Company (R. 53). The Trial Examiner's conclusion that Cook was not hired because of union activity is a deduction made by him without support of substantial evidence. Under no circumstances can it be said to be based upon a fair appraisal of the entire record or a preponderance of substantial evidence.

The Trial Examiner relied heavily upon the testimony of Messrs. Rawlins and Cook, quoting Mr. Davisson as admitting that

"Wilmac had something to do with Cook's inability to get on respondent's payroll."

This alleged admission was denied by Mr. Davisson (R. 88). In accepting Cook's and Rawlins' version, the Trial Examiner did not find or attempt to recite his reasons for disregarding Mr. Davisson's denial. The Trial Examiner did not weigh against this self-serving testimony of Mr. Cook and his friend Mr. Rawlins the objective facts, to-wit:

1. That Cook had never been in the employ of the Company (R. 32).
2. That Cook was still in the employ of Wilmac Logging Company, held some three-year seniority at Wilmac and was subject to call-back to work when they started logging (R. 53).
3. That Cook lived over fifty miles from the Company's logging operations (R. 32, 33, 41).
4. That the Company was only operating one crew truck from Granite Falls and wanted to get away from the transportation problem (R. 41, 42).
5. That the Company wanted to hire only new men who lived in Sultan or in the Sultan area near the Company's logging operation (R. 41, 69, 70, 87).
6. That William Davisson went to Vern Castle, the Business Agent of the Union, and inquired about available power saw men (R. 69, 70).
7. That the Company wanted men who would be available for the season and did not want to hire men who were employed elsewhere, held seniority rights elsewhere, and who would leave the Company's em-

ployment and return to their regular job when called (R. 90).

8. That Cook and Rawlins were logging on their own, had just purchased a donkey (machine) to use in their logging operation (R. 61).

9. That Rawlins, who had worked for the Company before, refused employment with the Company in April or May, 1953, because he and Mr. Cook were engaged in logging together and he would not leave Mr. Cook alone (R. 60-63).

The Trial Examiner also relied upon the testimony of Mr. Roberts, to-wit: That Mr. Scherrer, one of the partners, "out of a clear sky" and without provocation, knowing Roberts to be a brother-in-law of Cook, said the Company wouldn't hire Cook because of his alleged union activities (R. 79). It is to be noted that although both conversations allegedly took place at the operation, no one else was around to hear them. One of these alleged admissions is supposed to have taken place on the cold deck at the landing while Mr. Scherrer was helping Mr. Roberts, a young inexperienced man, do his work (R. 78). If Roberts needed help so badly that one of the partners had to pitch in and help him, it is absurd to think that a statement on a collateral subject, especially alleged union activities of Mr. Cook, was made by Mr. Scherrer. The Trial Examiner tried to overcome the obvious conclusion, not by a finding that Mr. Scherrer was not a credible witness, or that his denial (R. 109, 110) in the light of all the circumstances was an obvious falsehood, but by saying that Mr. Scherrer was an indiscreet individual (R. 14, 15).

There is nothing in this record to support the Trial Examiner's conclusion of "indiscretion." The Trial Examiner and the Board did not look to or consider related objective facts; they did not consider substantial evidence or base their conclusion upon a preponderance of the evience.

The Trial Examiner found that Cook resided in Granite Falls, but that this was "no obstacle to his hire" and states that other men were hired who lived in Granite Falls. The testimony showed the Company only operated one crew truck from Granite Falls (R. 71); that the Company wanted to get away from the transportation problem (R. 87), that Cook owned his home and considerable land near Granite Falls (over fifty miles from the Company's logging operations) (R. 32, 34), that he and Rawlins were engaged in logging Cook's land, and that on May 10, 1953, Rawlins, who had worked for the Company before, refused employment with the Company because he and Mr. Cook were logging on their own and he "couldn't leave Cook alone" (R. 60, 91); that Cook held seniority and was still employed at Wilmac Logging Company (R. 53); that the Company did not want to hire men who were employed elsewhere and subject to call-back to work and who in all probability would return to their regular job when called, thus leaving the Company short-handed (R. 90).

While the Trial Examiner and the Board said "others" were hired from Granite Falls area (R. 15), they did not state all the facts. Six men were hired after May 10th. Four lived in or were picked up in the vi-

cinity of Sultan (R. 92, 93). Two were from Granite Falls (R. 92), one of whom was an employee just discharged from military service and re-instated to his job (R. 92), to which he was entitled both under the union contract and the laws of the United States. The other man who was hired and lived in the vicinity of Granite Falls was hired for the rigging crew (R. 92). The rigging crew men were hard to find (R. 92).

The Trial Examiner found that Cook had not removed himself from the labor market by logging his own land. Cook and Rawlins also logged other land (R. 44, 45, 46, 47, 48, 49). Rawlins on May 10th refused employment with the Company on the ground he couldn't leave Cook alone (R. 60, 91). It is perfectly clear that Cook and Rawlins were in together and that neither one would leave the other unless both had obtained gainful employment acceptable to them. In accepting Cook's self-serving declaration that he would only log for himself when he was not employed, the Trial Examiner again demonstrated that he was not predicating his findings upon substantial evidence.

The Trial Examiner found that Davisson went to Mr. Rawlins' home early in April and told Rawlins he would not be hired

> "because of the union activity, because of the strike." (R. 11)

Mr. Davisson denied this (R. 90, 91). This testimony is not only irrelevant and immaterial and prejudicial, but outside of the scope of the complaint. It is also so unbelievable as to be unworthy of mention. It is beyond the realm of reason to believe that an employer would seek

out a prospective employee for the purpose of volunteering such a statement, the effect of which could only be too well known to the employer. The same applies to Mr. Davisson's alleged statement that it appeared as if "they were trying to starve Rawlins and Cook out." Both statements were unequivocally denied by Mr. William Davisson (R. 90, 91). Again the Trial Examiner and the Board chose to rely upon disputed testimony and failed to weigh against it undisputed facts and circumstances existing at the time. All of the facts and circumstances shown by undisputed evidence weighed more heavily in favor of respondents' position and testimony than that of Mr. Rawlins or Mr. Cook.

We submit that the conclusions drawn by the Trial Examiner and the Board from the evidence and testimony in this case do not meet the standards laid down in *NLRB v. Citizens News Co.,* 134 F.(2d) 970 (C.A. 9), wherein the court said:

> "In considering this question it should be emphasized that the right to terminate a contract of employment is a constitutional right of the utmost importance. The mere discharge of an employee with or without reason is therefore not evidence of intent to affect labor unions or the rights of employees under the National Labor Relations Act. That there must be more than mere discharge is clearly recognized by the Board in its findings * * *. Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding.
>
> "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a dis-

> charge as the result of such activities. There must be more than this to constitute substantial evidence."

Applying the statement made by this court in *NLRB v. Citizens News Co.,* 134 F.(2d) 970 (C.A. 9), to the instant case, which involves an alleged refusal to hire, and bearing in mind that the right to employ or not to employ is just as important a constitutional right as the right to terminate employment, the court's language may be paraphrased as follows:

> The fact that a person may be engaged in labor union activities long prior to the date he applied for work with another employer and without a showing that the new employer had knowledge of such alleged prior union activities, taken alone, is no evidence at all of a refusal to hire as a result of such activities. There must be more than this to constitute substantial evidence.

The record in the instant case shows no union activities of Mr. Cook other than that while employed elsewhere and prior to 1953 he was an officer of the local union and served on union committees and that he along with all other workers represented by the International Woodworkers of America in the Pacific Northwest, engaged in an industry-wide strike and that the operation at which he was employed and one other operation were on strike a second time in 1952 over the union shop demand. There is not a single bit of evidence in this record to show that Mr. Cook engaged in any unusual union activities or that respondents here knew of or knew what Mr. Cook's union activities were in fact or were supposed to have been. The holding of the Trial Examiner that it was because of Mr. Cook's union ac-

tivities that the respondent did not hire him assumes that Mr. Cook was engaged in union activities which were distasteful to his employer at the time and that the respondents herein were informed and advised of such union activities and that because thereof they declined to hire Mr. Cook. It is obvious that the conclusion drawn by the Trial Examiner is predicated upon suspicion, surmise, implications and plainly incredible evidence.

CONCLUSION

By way of conclusion it is respectfully submitted that a preponderance of the substantial evidence in the case establishes beyond a shadow of doubt the following facts:

1. That the Company is a partnership and all of the partners had been union members and in many cases active in union affairs.
2. That the Company's employees have consistently been 100% members of the union.
3. That the Company and the Union had a working agreement under which grievances were to be handled and the union at no time followed the grievance procedure on Mr. Cook's claim.
4. That the Company's logging operation was located near Sultan, Washington, over fifty miles from Granite Falls.
5. That the Company in seeking new employees went to the Union Business Agent to inquire as to available power saw men in the Sultan area.
6. That the Company was operating one crummy from Granite Falls to its logging operation and wanted to get away from the problem of transporting employees, and therefore, was seeking new employees from the Sultan area.

7. That in hiring new men the Company wanted men who were not regularly employed elsewhere and who wouldn't leave the Company when their regular job opened up and they were called back to work.
8. Mr. Cook was regularly employed at the W.R.W. Logging Company in Granite Falls and although in a lay-off status because of the seasonality of logging, held seniority and other employment rights and was subject to call back to work upon resumption of operations by W.R.W. Logging Company.
9. That Cook lived in or near Granite Falls, over fifty miles from the Company's logging operation, owned his own home, was engaged in logging as a partner with Mr. Rawlins, that neither Cook nor Rawlins would accept employment unless both were employed.
10. That men hired after Mr. Cook applied and after Mr. Rawlins informed respondent that he and Cook were logging on their own and for that reason refused employment were men from the Sultan area in that of the six hired, four lived in or near Sultan, or were picked up in Sultan. Of the two from Granite Falls, one was an employee of the Company who had been on leave for military duty and reinstated to his former employment when discharged by the Army; that the other man who lived near Granite Falls was on the rigging crew and rigging crew employees were hard to find.

All of the foregoing facts are established by undisputed testimony and evidence. None of the foregoing undisputed facts were weighed by the Trial Examiner or the Board against the disputed testimony upon which both relied to support the conclusion that the employer had refused to hire Mr. Cook because of union activities.

The Trial Examiner and the Board failed to view the record as a whole and failed to take into account uncontroverted testimony in the record which detracted from the weight given by the Board to the controverted testimony relied upon by the Trial Examiner and the Board. The Board did not apply the rule of reasonableness laid down by *Washington V. & M. Coach Co. v. Labor Board,* 301 U.S. 142. The Board in adopting the Trial Examiner's findings failed to heed the dictates of the conference report (House Reports 510, 80th Congress, page 53, 54) wherein it is said the Board:

> "should indicate an actual weighing of the evidence setting forth reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, or drawing this inference rather than that."

The Board's conclusion is predicated upon "surmise, suspicion, implications or plainly incredible evidence" contrary to the rule laid down in *Universal Camera Corp. v. NLRB,* 340 U.S. 474.

It is not enough that this court when reviewing the record could find therein

> "evidence which, when viewed in isolation substantiated the Board's findings." *Universal Camera Corp. v. NLRB,* 340 U.S. 474.

The Board's findings cannot be supported by the record herein when considered as a whole.

We respectfully submit that the order of enforcement sought by the Board must be denied.

Respectfully submitted,

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Attorneys for Respondents.